Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5(S1)–22–231 OF 1996
ABDUL MALIK ISHAK J
15 AUGUST 2005

Contract — Sale and purchase of property — Sale and purchase agreement — Dispute on area of land that was sold to plaintiff — Whether breach of contract and misrepresentation by defendant — Whether there was issue of trespass — Reliefs sought for by plaintiff

The plaintiff purchased a double storey bungalow house from the defendant according to the terms of the sale and purchase agreement. An agreement was signed between the parties. The area mentioned tallied with the area as shown in the issue document of title. The defendant as the developer had transferred the same area of land to the plaintiff. Subsequent to the commencement of these proceedings, evidence was led to show that the plaintiff had re-sold the double storey bungalow house and transferred the land to the new buyer at a much higher price and the area as shown turned out to be the same as stated in the sale and purchase agreement entered into between the plaintiff and the defendant. There were four major issues for determination: (1) what was the area of the land that was sold to the plaintiff; (2) was there a breach of contract by the defendant and was there a misrepresentation by the defendant; (3) the 'fence' issue to be read with the issue of trespass; and (4) what were the reliefs sought for by the plaintiff.

Held, dismissing the plaintiff's claim with costs:

(1) The area seen in the issue document of title was the area transferred by the defendant to the plaintiff and subsequently re-sold by the plaintiff to the new buyer. That being the case, there cannot therefore be an issue on the area of the land (see para 11).

(2) At the trial, the plaintiff did not elect as to which was the cause of action: whether it was a breach of the term or misrepresentation. The cumulative plea of a breach of a term and misrepresentation was mutually inconsistent and both must, in law, fail for want of certainty (see para 15).

(3) Damages, subject to proper pleading and proof, could be claimed for breach of contract. But, in the absence of fraud or negligence, there could be no damages for innocent misrepresentation. If neither negligence nor fraud was alleged with the relevant particulars, just like the present case at hand, then the alleged misrepresentation was an innocent misrepresentation and it did not attract any award of damages (see para 20).

(4) There was no evidence emanating from the plaintiff that he would not have bought the land but for the alleged misrepresentation. In the absence of such evidence, the test of causation was not satisfied at all (see para 28).

(5) There was no basis for the plea of trespass. The unchallenged and undisputed evidence would be that the fence was erected by the defendant's contractor when the defendant was still the registered owner of the land. The plaintiff had admitted that the fence was put up before the sale to the plaintiff. Since the land had been transferred to the plaintiff, the defendant was unable to enter the land and demolish the fence at will (see para 62).

(6) There was no rescission at all. Instead there was a total affirmation. The land and the double storey bungalow house had been transferred to the plaintiff. The plaintiff sought for specific performance in order to fill the land at the back portion and to erect a fence, etc. But, unfortunately, there was no term in the sale and purchase agreement for this to be done. The court would not decree specific performance of such a building contract (see para 70).

(7) There was no provision in the sale and purchase agreement for the erection of a fence at the rear of the double storey bungalow house. The plaintiff could not seek what was not in the contract (see para 73).

(8) Since the double storey bungalow house had been re-sold to the new buyer, the plaintiff's claim had become academic. The reliefs sought by the plaintiff to remove the fence, and to erect a new fence would not be carried out at all. Where the subject matter had ceased to exist by virtue of the re-sale, the reliefs sought were unavailable and the plaintiff's claim must fail (see para 87).

[**Bahasa Malaysia summary**

Plaintif membeli sebuah banglo dua tingkat dari defendan menurut terma-terma perjanjian jual beli. Satu perjanjian ditandatangani oleh pihak-pihak. Kawasan yang dinyatakan sama dengan kawasan yang ditunjukkan di dalam dokumen hakmilik keluaran. Defendan sebagai pemaju telah memindahmilikkan kawasan tanah yang sama kepada plaintif. Selepas permulaan prosiding ini, keterangan menunjukkan yang plaintif telah menjual semula banglo dua tingkat itu dan memindahmilikkan tanah tersebut kepada pembeli baru pada harga yang lebih mahal dan kawasan yang ditunjukkan adalah kawasan yang sama dengan kawasan yang dinyatakan di dalam perjanjian jual beli yang dimasuki oleh plaintif dan defendan. Terdapat empat isu utama untuk diputuskan: (1) apakah kawasan yang dijual kepada plaintif; (2) sama ada terdapat pengingkaran kontrak oleh defendan dan adakah terdapat salah nyata oleh defendan; (3) sama ada isu 'pagar' dibaca bersama dengan isu pencerobohan; dan (4) apakah relif-relif yang dipohon oleh plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Kawasan yang tertera di dalam dokumen hakmilik keluaran merupakan kawasan yang dipindahmilikkan oleh defendan kepada plaintif dan yang kemudiannya dijual oleh plaintif kepada pembeli baru. Oleh yang demikian, tidak terdapat isu berhubung dengan kawasan tanah (lihat perenggan 11).

(2) Semasa perbicaraan, plaintif tidak memilih yang mana menjadi kausa tindakan: sama ada pengingkaran terma atau salah nyata. Akuan kumulatif pengingkaran sebuah terma dan salah nyata bersama adalah tidak konsisten satu sama lain dengan itu mengikut undang-undang kedua-duanya mestilah gagal kerana ketiadaan kepastian (lihat perenggan 15).

(3) Gantirugi, tertakluk kepada pliding dan bukti wajar, boleh dituntut untuk pengingkaran kontrak. Tetapi, tanpa fraud atau kecuaian, tidak boleh ada gantirugi untuk salah nyata ikhlas. Jika tiada kecuaian atau fraud dikatakan dengan butir-butir relevan, sama seperti kes semasa, maka salah nyata yang dikatakan itu adalah satu salah nyata ikhlas dan tidak dapat menarik sebarang award ganti rugi (lihat perenggan 20).

(4) Tiada keterangan yang datang dari plaintif bahawa beliau tidak akan membeli tanah tersebut jika bukan kerana salah nyata yang dikatakan itu. Dalam ketiadaan keterangan sedemikan, ujian penyebab tidak dipuaskan sama sekali (lihat perenggan 28).

(5) Tiada asas untuk akuan pencerobohan. Keterangan yang tak disangkal dan dipertikaikan adalah pagar tersebut dibina oleh kontraktor defendan semasa defendan masih menjadi pemilik berdaftar tanah tersebut. Plaintif mengakui yang pagar tersebut diletakkan sebelum jualan kepada plaintif. Oleh kerana tanah tersebut telah dipindahkan kepada plaintif, defendan tidak dapat memasuki tanah tersebut dan meruntuhkan pagar tersebut sesuka hati (lihat perenggan 62).

(6) Langsung tidak terdapat pembatalan. Sebaliknya terdapat pengesahan sepenuhnya. Tanah tersebut dan rumah banglo dua tingkat itu telah dipindahmilikan kepada plaintif. Plaintif memohon pelaksanaan spesifik untuk mengisi tanah pada bahagian belakang dan membina sebuah pagar, dsb. Tetapi malangnya, tiada terma di dalam perjanjian jual beli untuk ini dilakukan. Mahkamah tidak boleh memberikan pelaksanaan spesifik untuk kontrak pembinaan sedemikian (lihat perenggan 70).

(7) Tiada peruntukkan di dalam perjanjian jual beli tersebut untuk pembinaan pagar pada bahagian belakang rumah banglo dua tingkat itu. Plaintif tidak boleh memohon apa yang tidak ada di dalam kontrak (lihat perenggan 73).

(8) Oleh kerana rumah banglo dua tingkat itu telah dijual semula kepada pembeli baru, tuntutan plaintif telah menjadi akademik. Relif-relif yang dipohon oleh plaintif untuk membuang pagar dan membina pagar yang

baru tidak akan dibuat langsung. Apabila perkara ini telah tidak wujud kerana jualan semula itu, relif-relif yang dipohon tidak lagi tersedia dan tuntutan plaintif mestilah gagal (lihat perenggan 87).]

Notes

For cases on sale and purchase agreement see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4402–4407.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500 (refd)
Ainsbury v Millington [1987] 1 All ER 929 (refd)
Appuhamy v Dato' Ajit Singh [1970] 1 MLJ 194 (refd)
Burton v Karbowsky (1914) SR 14 NSW 373 (refd)
Chew Hock San & Ors v Connaught Housing Development Sdn Bhd [1985] 1 MLJ 350 (refd)
Hayward & Anor v Pullinger & Partners Ltd [1950] 1 All ER 581
Ilkiw v Samuels & Ors [1963] 1 WLR 991 (refd)
Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 (refd)
Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd [1983] 2 MLJ 8 (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (refd)
Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor [1999] 5 MLJ 670 (refd)
Pennslyvania Shipping Co v Compagnie Nationale De Navigation [1936] 2 KBD 1167 (refd)
R Griggs Group Ltd & Ors v Ross Evans & Ors [2005] EWCA Civ 11 (refd)
Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd [2000] MLJU 752 (refd)
Robin Ray v Classic FM (1998) FSR 622 (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)
Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok & Anor [1997] 3 MLJ 211 (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460 (refd)
Subramanian v Retnam [1966] 1 MLJ 172 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)
Travelsight (M) Sdn Bhd & Anor v Atlas Corporation Sdn Bhd [2003] 3 AMR 317 (refd)
Upton v Chipman (1892) 13 ALT 312 (refd)

Legislation referred to

Contracts Act 1950 s 19
Evidence Act 1950 s 92, (a), (b)
Housing Developers (Control And Licensing) Regulations 1989 reg 11
Rules of the High Court 1980 O 18 r 15(1)

Kuldip Randhawa (Kuldip Randhawa & Associates) for the plaintiff.
RR Sethu (RR Sethu) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] The present civil suit no: S5(S1)–22–231 of 1996 was heard together with seven other civil suits, namely:

(a) S4–22–229 of 1996;

(b) S5–22–230 of 1996;

(c) S2–22–232 of 1996;

(d) S3–22–233 1996;

(e) S4–22–234 1996;

(f) S5–22–235 of 1996; and

(g) S1–22–236 of 1996.

[2] Fortunately, all the seven other civil suits as stated above were settled and I struck out these seven other civil suits with no orders as to costs. What was left was only the present civil suit, namely, S5(S1)–22–231 of 1996.

[3] This was a part heard case of the civil one judge and I had the unfortunate task of completing his part heard. I will refer to the notes of evidence recorded by the civil one judge as well as that recorded by myself in the course of this judgment. It must be borne in mind that this case emanates from the civil one division when I was in the civil five division. This case followed me to the commercial four division when I was transferred there and now this case is still with me when I was transferred to the civil six division. I am still in the civil six division. In fact, I am still in the civil division, located at Wisma Denmark, after all these years. Oh, what a shame! It has been a long arduous route. But the hearing of this case must proceed, no matter what happens, to its final conclusion. Justice must be seen to be done to the parties.

THE FACTS

[4] An appraisal of the evidence, after a full-fledged trial, would show the following facts.

[5] The plaintiff purchased a double storey bungalow house from the defendant according to the terms of the sale and purchase agreement. A formal written agreement was in fact signed between the parties. The area mentioned tallied with the area as shown in the issue document of title. All the relevant documents are put in part 'A' and so the area of the land must be deemed to be admitted as true. It must be emphasised that the defendant as the developer had transferred the same area of land to the plaintiff. Subsequent to the commencement of these proceedings, evidence was led to show that the plaintiff had re-sold the double storey bungalow house and transferred the land to the new buyer at a much higher price and the area as shown turned

out to be the same as stated in the sale and purchase agreement entered into between the plaintiff and the defendant.

[6] I must emphasise the following facts:

(a) That the plaintiff agreed to buy not just a property but a double storey bungalow house to be erected on a piece of land measuring 110 feet x 95 feet (see encl 26 p at p 29 where the recital defines 'the said property' to include both the 'lot' (ie the land) and the 'building' and cl 1 of the sale and purchase agreement covenanting the sale refers to 'the property' as so defined).

(b) That the plans to be annexed to the sale and purchase agreement were layout or site plan and not the contour plan as alleged by the plaintiff together with the extracts of the building plan. It was for this reason that the slopes were not shown. The submission of the learned counsel for the plaintiff to the effect that:

> The logical conclusion … to be derived from the above statement is that the slope is not shown in any of the plans if it is part of the purchased property.

With due respect, what the learned counsel for the plaintiff submitted was nothing more than a mere contradiction in terms. It must be borne in mind that a conclusion is a statement and not a question. It was unfortunate that the plaintiff led no evidence, from other architects, to show and say that a building plan or the site plan should show the contour of the land. The learned counsel cannot now seek to remedy that omission by relying on its own submission unsupported by any evidence at all.

(c) That the sale and purchase agreement entered between the plaintiff and the defendant is an agreement that is prescribed by reg 11 of the Housing Developers (Control And Licensing) Regulations 1989. It is thus a statutory contract and the general rule is that there can be no modifications of such a contract. So, no terms can be implied into such a contract (*SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (FC)).

(d) That the layout plan is merely a location plan and not a contour plan. Itis the same as the plan as shown in the issue document of title. The only difference is this. The issue document of title shows the layout of the particular lot whereas the layout in the sale and purchase agreement shows the other adjoining lots. It can be discerned from the plan in the issue document of title as reflected at p 2 of encl 26 that no contour or topography of the land is shown. Even the plaintiff knew that the slope was part of the title.

GENERAL OBSERVATIONS

[7] The trial went on slowly but surely. The submissions of the learned counsel for the plaintiff were quite lengthy. In the judgment, certain details will be highlighted. That cannot be avoided. It seems to me that, in the course of her submissions, the learned counsel for the plaintiff put forward matters that were not in the evidence and there was a distortion of the evidence of the defendant's witnesses. The learned counsel for the plaintiff's submissions went to the extent of giving expert evidence on the interpretation of the plans, the contents of the plans and the practice of the housing industry. All these submissions were indeed interesting and thought provoking. But, alas, no evidence was led by the plaintiff on these matters. Furthermore, there were factual allegations in the submissions of the plaintiff's counsel yet they were made without reference to the witnesses' statements or even the notes of evidence.

THE ISSUES TO BE DETERMINED

[8] Essentially there were four major issues for determination. This can readily be seen from the plaintiff's amended statement of claim as reflected in encl 84. I will now state the four major issues in this way:

(1) What was the area of the land that was sold to the plaintiff?

(2) Was there a breach of contract by the defendant and was there a misrepresentation by the defendant?

(3) The 'fence' issue to be read with the issue of trespass.

(4) What were the reliefs sought for by the plaintiff?

[9] I will now examine these four issues in quick succession.

THE FIRST ISSUE

[10] This issue can be resolved by looking at the documentary evidence in Part 'A' of encl 26 and the subsequent documents that the plaintiff produced on his recall for further cross-examination as to the events that occurred between the adjournment of the trial by the civil one judge (hereinafter referred to as 'J1') and the resumption of the trial by myself.

[11] Paragraph 4 of the amended statement of claim states that it was a term of the agreement that the plaintiff purchased a property that measured '110 feet x 95 feet with an area of 10,450 square feet'. In fact, the area can be seen in the issue document of title as reflected at pp 1 to 3 of encl 26 and this was the area transferred by the defendant to the plaintiff and subsequently re-sold by the plaintiff to the new buyer as seen in exhs D6 to D8. That being the case, there cannot therefore be an issue on the area of the land for trial before me.

[12] In his witness statement as reflected in encl 28, the plaintiff admitted that 'part of the land was later found to fall onto the slope towards the river. By this I mean that the entire 10,450 square feet was not on a flat piece of land. A portion of my land was on the slope' (see the question and answer no: 9 of encl 28). The plaintiff also admitted that there was no shortfall on paper (see p 18 of the notes of evidence recorded before J1). The land had been transferred to the plaintiff on 27 April 1994 (see p 18 of the notes of evidence recorded before J1). It was on that date that the plaintiff became the owner. Incidentally, this date too was important for the claim that was grounded on trespass.

THE SECOND ISSUE

[13] I will examine the second issue under different heads.

(a) Inconsistencies of the plaintiff's pleading

[14] It is now trite law that the parties are bound by their pleadings and they cannot depart from it (*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 (SC); and *Renofac Builder (M) Sdn Bhd v Chase Perdana Bhd* [2000] MLJU 752). Flowing from this, the crucial questions to pose would be as follows:

> Does the complaint in regard to the second issue relate to the shortfall in the area of the land sold or does it relate to the failure to conform to the state of the land as allegedly represented at the time of the sale?

[15] In order to answer these questions, it would be ideal to refer to paras 5, 6, 7 and 8 of the amended statement of claim as reflected at encl 84. I shall do so accordingly:

(1) Paragraph 5 of the amended statement of claim states as follows:

> The defendant also represented to the plaintiff that the purchased property was of flat land.

The plaintiff says that this was the misrepresentation that the defendant had made to the plaintiff. If this was so, then this must be the misrepresentation that is in issue.

(2) Paragraph 6 of the amended statement of claim is both confusing and self-contradictory. It states as follows:

> Relying *inter alia* on the term in para 4 above, and on the representation in para 5 above, the plaintiff signed and executed the said sale and purchase agreement.

The plaintiff seems to rely on the term of the contract as pleaded in para 4 and then he relies on the representation in para 5. It is not even pleaded in the alternative. If a statement is alleged to have become a term, then it cannot become a misrepresentation. Incidentally, para 4 of the amended statement of claim states as follows:

It was a term of the said sale and purchase agreement that the purchased property measured 110 feet x 95 feet with an area of 10,450 square feet.

In fact this was what was sold to the plaintiff by the defendant and the plaintiff too had re-sold the same thing — referring to the double storey bungalow house with land, to the new buyer at a profitable price.

(3) I pause here for a moment. I must take stock of the situation at hand. I have this to say. A term of the contract and representation are two different things. They are poles apart. Both cannot co-exist. At the trial, the plaintiff did not elect as to which was the cause of action: whether it was a breach of the term or misrepresentation. The cumulative plea of a breach of a term and misrepresentation is mutually inconsistent and both must , in law, fail for want of certainty. Once a representation becomes a term of a contract, the representation ceases and has become part of the contract. But where the representation was not included as a term of the contract, that representation would continue its independent existence. And where the representation is included as a term of the contract then that representation is 'merged' into the contract and incorporated into the contract. When that happens the remedy will lie for breach of contract. A classic example would be the case of *Pennslyvania Shipping Co v Compagnie Nationale De Navigation* (1936) 2 KBD 1167 and there Branson J laid down the law in these fine words (see p 1171 of the report):

It is there pointed out that at common law if an innocent misrepresentation did not afterwards become part of the contract its untruth was immaterial. Insuch a case equity might intervene to avoid or rescind the contract. But where the representation has been embodied in the contract, there the courts of common law could deal with it according to whether it was a condition entitling the injured party to repudiate the contract or a warranty giving rise only to an action ex contractu for damages. The representation thus becomes merged in the higher contractual right, and there was no need to resort to equity for rescission. The fusion of law and equity does not affect this result, as Anson correctly states at p 183:

It is perhaps well to add that the Judicature Act has not of course affected the common law rules regarding an innocent representation which has become a term of the contract, but the further discussion of this matter falls under the subject of breach of contract. The equitable remedy of rescission merely supplements these rules, as it can provide for the case, to which they did not apply, of an innocent misrepresentation which is not a term in the contract.

The plaintiffs cannot get rescission of the contract on the ground of misrepresentation inducing it.

[16] Thus, the distinction is between 'pre-contractual' statements and 'contractual' statements. The latter are referred to, in law, as 'terms of the contract'. Gopal Sri Ram JCA puts it nicely in *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500, at pp505 and 506:

Having regard to the relevant provisions of the Contracts Act 1950 and the authorities upon the subject, we consider the following propositions to be settled and beyond argument.

Since the consequences for a statement made by a party to a contract depends upon the stage at which the statement is made, the law recognises a division between contractual and pre-contractual statements.

Pre-contractual statements are called 'representations'. However, contractual statements are obligations actually undertaken by the party making them. They are referred to by lawyers as 'the terms of a contract'.

Whether a particular statement made in the course of negotiations leading to the making of a contract is a representation or a term depends upon the intention of the parties and is to be deduced from the totality of the evidence. While decided cases suggest differing approaches, it is clear that no single criterion is conclusive. See, for example, *Oscar Chess Ltd v Williams* [1957] 1 WLR 370; *Dick Bentley Productions Ltd v Harold Smith* (Motors) Ltd [1965] 1 WLR 623.

The traditional method of classifying the terms of a contract is according to the degree of their importance. Stipulations that are essential are called 'conditions', while those of a secondary nature are referred to as 'warranties'. The breach of a condition entitles the innocent party to repudiate the contract, that is, to treat it as at an end as to future obligations, and to sue for damages. On the other hand, the breach of a warranty sounds only in damages. Whether a particular term is a condition or a warranty is a matter of judicial impression, ie it is a question of law. See Ching *Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675.

[17] An example of a case where the representation became a term of the contract would be the case of *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* [1999] 5 MLJ 670. In that case, the contents of a sales brochure were incorporated into the recitals of the agreement.

[18] I must categorically state that the cause of action and the remedies for misrepresentation and the breach of a contract are entirely different. The cause of action, in the case of non-compliance with a term, is that of a breach of contract and the remedy is for damages. But where the representation remains a representation then the contract is said to be voidable in that it remains valid until and unless rescinded by the innocent party (see the decision of the Court of Appeal in the case of *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok & Anor* [1997] 3 MLJ 211).

(b) Remedies

[19] Now, the remedy for rescission remains so long as the innocent party had not affirmed the contract (*Travelsight (M) Sdn Bhd & Anor v Atlas Corporation Sdn Bhd* [2003] 3 AMR 317). In other words, to put it differently, the remedy of rescission may be lost by a host of reasons such as delay, acceptance, intervention of third party rights, etc. (*Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* at p 508 where Gopal Sri Ram JCA said:

An innocent representation (one that is neither fraudulent nor negligent) entitles the representee to merely rescission, although, in certain cases (not relevant for present purposes) he may also obtain an indemnity. He may not however have damages. It is also important to recognise that relief by way of an indemnity is not made on the same footing as damages.

An action for rescission may be met by any of the equitable defences available against claims for other forms of specific relief, eg a plea of affirmation or of laches or a plea that damages are an adequate remedy. Rescission may also be refused by a court on the ground that restitutio in integrum is not possible because, eg an innocent third party's rights have intervened in the interim.

[20] In my considered view, damages, subject to proper pleading and proof, can be claimed for breach of contract. But, in the absence of fraud or negligence, there can be no damages for innocent misrepresentation. If neither negligence nor fraud is alleged with the relevant particulars, just like the present case at hand, then the alleged misrepresentation is an innocent misrepresentation and it does not attract any award of damages (see the decision of the Court of Appeal in *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460). In the present case, the plaintiff's amended statement of claim, similarly, alleges neither fraud nor negligence.

[21] It is apt to mention that the plaintiff has not pleaded his claim in the alternative. Instead the plaintiff has lumped both the breach of a term and misrepresentation together as if the plaintiff was entitled to obtain the relief in respect of both claims. I must hold and it was part and parcel of my judgment that the plaintiff's pleading was wholly embarrassing. Here, there is no plea in the amended statement of claim to invoke any of the exceptions to s 92 of the Evidence Act 1950.

[22] Furthermore the plaintiff claimed that there was a 'shortfall' of 696 square feet of land from that which was agreed (see para 7 of the amended statement of claim). Now, the complaint of the plaintiff was in regard to the insufficient area of the land as opposed to the state or condition of the land (ie flat land). It must be borne in mind that the sale and purchase agreement does not describe the land as 'flat land'. Since the sale and purchase agreement is found in Part 'A' of encl 26, its contents are accepted and admitted as true. At any rate, the terms of a written and formal contract cannot be varied nor modified by oral evidence as exemplified in s 92 of the Evidence Act 1950.

[23] Paragraph 8 of the amended statement of claim states as follows:

The defendant has also breached the said representation because the whole land which was agreed in the sale and purchase agreement was found to include land which was not flat.

[24] But there is no assertion in the amended statement of claim that the land sold was agreed to be flat. If the assertion of fact in para 8 of the amended statement of claim is correct then there can be no 'shortfall' as alleged in para 7

thereto. This is also inconsistent with the plaintiff's witness statement at question and answer number 9 of encl 28.

[25] Paragraph 9 of the amended statement of claim reads as follows:

> By erecting a steel fence across the plaintiff's land, the defendant has trespassed on the plaintiff's land and has separated the said flat land from the sloping land. The defendant then delivered to the plaintiff only the flat land which was separated as if only that piece of land is the property under the said agreement.

[26] In my judgment, the second sentence of para 9 of the amended statement of claim is wholly inconsistent and untenable, both factually and legally, for the following reasons:

(i) factually speaking there is no special form for delivery of land in a contract of sale and the land area shown in the title is 10,450 square feet and it was this area that was transferred to the plaintiff;

(ii) the plaintiff's complaint is that the sale and purchase agreement and the representation were to the effect that the land sold was flat land, and if that was the case where is the short delivery of the land?;

(iii) the whole area as shown in the land title had been transferred entirely to the plaintiff; and

(iv) it is the plaintiff's own subjective assumption that the area of the land within the rear fence alone had been delivered to him.

[27] There was evidence to this effect. That when PW3 (Lai Hin Chin) and PW4 (Dave Kok Kong Yong) were asked to measure the land, they only measured the area of the land within the fence and performed proper boundary survey according to the title (see pp 1 to 3 of encl 26 and DW1's (Hiroshi Ueda's) evidence as seen at p 77 of the notes of evidence recorded by myself).

(c) Alleged misrepresentation

[28] A misrepresentation is a false or untrue statement that the representee (referring to the plaintiff) relied on in order to enter into the contract. Had it not been for the alleged misrepresentation, the representee (referring to the plaintiff) would not have entered into the contract (*Travelsight (M) Sdn Bhd & Anor v Atlas Corporation Sdn Bhd*; and *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim*). But alas, there was no evidence emanating from the plaintiff (PW1) that he would not have bought the land but for the alleged misrepresentation. In my judgment, in the absence of such evidence, the test of causation was not satisfied at all.

[29] Now, the plaintiff (PW1) had alleged in court that DW4 (Siow Fook Lin — the sales executive) had misrepresented to him that the fence demarcated the boundary of the land sold (see PW1's witness statement at Question And

Answer number 17(c) of encl 28). DW4 (Siow Fook Lin) took the stand and gave evidence. This court certainly had the opportunity to observe both PW1 (the plaintiff) and DW4 (Siow Fook Lin) in the witness box. Before I proceed any further, I must make the following salient observations:

(1) The first thing to note is that the plaintiff (PW1) is an instrument engineer (see p 12 of the notes of evidence recorded before J1). There is a typographical error where the word 'instruction' should read 'instrument'. On the other hand, DW4 (Siow Fook Lin) is only a sales representative/executive.

(2) DW4 (Siow Fook Lin) had not been to the site and she denied telling the plaintiff (PW1) that the land was partly on a slope.

(3) Although DW4 (Siow Fook Lin) gave evidence in court for the first time, I was impressed by her demeanour. She was forthright. She was certainly not evasive like the plaintiff (PW1).

(4) The slope would only appear on a contour plan. But on the two dimensional drawings it would show everything to be flat (see p 13 of the notes of evidence recorded before J1 and the notes of evidence recorded by myself at p 77).

(5) The plaintiff (PW1) had seen the steep slope behind the land and a main drain and river (see p 15 of the notes of evidence recorded before J1).

(6) The plan identifying the land in the title would not show the terrain of the land. The plaintiff (PW1) admitted that he had not seen titles showing the slopes. Indeed this is a matter of common and public knowledge of titles issued under the National Land Code 1965.

(7) The plaintiff (PW1) claimed to be unaware of the post of project consultants to the defendant's project (see p 16 of the notes of evidence of J1) and that he had not even made enquiries of the defendant as to whether the defendant had such a personnel. But in encl 26 at p 221, the plaintiff (PW1) said that the consultants were negligent.

[30] I must now proceed further. A mass of evidence must be referred to.

[31] The plaintiff (PW1) wrote the first letter to the defendant on 3 January 1995 and that letter can be seen at p 163 of encl 26. In that letter there was no mention of any misrepresentation by DW4 (Siow Fook Lin) or by anyone else. The plaintiff knew that the area of the land was 10,450 square feet and there was no mention that the entire land that he bought was represented to be 'flat' land. One would have thought that in the very list of the written communication on the subject matter, the plaintiff (PW1) would have mentioned about the misrepresentation. The fact that the plaintiff (PW1) did not mention about the alleged misrepresentation meant that this was an afterthought.

[32] It was in his second letter as seen at p 165 of encl 26 that the plaintiff (PW1) claimed that DW4 (Siow Fook Lin) had represented that what was sold does not fall onto the slope and that PW1 (the plaintiff) at no time agreed to the land falling into the slope nor did PW1 (the plaintiff) agreed to the land size other than that as specified in the sale and purchase agreement. The defendant disputed the plaintiff's claim and this can be seen at p 167 of encl 26. According to the defendant, the plaintiff (PW1) bought the land that was in existence and that land fall onto the slope.

[33] In his complaint to the Ministry as seen at p 168 at para (b) of encl 26, the plaintiff (PW1) claimed that the fencing demarcated the boundaries and that 'there is no other boundaries stipulated in the sale and purchase agreement'. With respect, there was nothing in the sale and purchase agreement which stated that the fencings demarcated the boundaries. There was no mention of the alleged representation by DW4 (Siow Fook Lin) in regard to the state of the land or the boundary. It seems to me that these allegations formed the main plank of the plaintiff's case at the trial yet the plaintiff did not mention all these misrepresentations to the Ministry. Such failure must be construed against the plaintiff. It rendered the plaintiff's version at the trial to be very doubtful.

[34] Surprisingly in a further letter dated 4 September 1995 as seen at pp221 to 222 at para 1 of encl 26, the plaintiff (PW1) accepted the fact that that part of the land falls onto the slope and that area was beyond the fence. But the plaintiff's counsel in the course of cross-examining DW1 (Hiroshi Ueda) had put to DW1 that he had misrepresented to the plaintiff. In sharp contrast, it was the plaintiff's own evidence that showed and suggested that it was DW4 (Siow Fook Lin) that had misrepresented. Somehow the conduct of the plaintiff's case, with respect, was not done with precision. The notes of evidence recorded by myself at p 65 would show the following exchange when DW1 (Hiroshi Ueda) was being cross-examined:

> Put: You misled the plaintiff by not indicating the boundary line of the house sold to him. Disallowed by the court.

[35] Again at p 71 of the notes of evidence recorded by myself, the following exchanges appeared when DW1 (Hiroshi Ueda) was being cross-examined:

> Put: You had misrepresented the topographical terrain to the plaintiff.
>
> A: No.
>
> Put: You had misrepresented the measurement of the land area sold to the plaintiff.
>
> A: No.

[36] Now, at this juncture, it would be appropriate to look at the plaintiff's case prior to the trial.

[37] In the plaintiff's amended statement of claim, the particulars of misrepresentation were not stipulated. But in the plaintiff's witness statement at question and answer number 17 of encl 28, the plaintiff categorically sets out three items:

(1) That the defendant's representative had said that 'my land will not be on the slope' but, unfortunately, the defendant's representative was not identified. That the scaled down model showed the house on flat land and no slope was shown on the model.

(2) That the sales brochure and specification 'showed no indication of any slope on the bungalow lots.'

(3) That DW4 (Siow Fook Lin) had mentioned that there was no slope.

[38] I will now say something about the scaled down model. The plaintiff (PW1) said that the model did not show the slope. DW1 (Hiroshi Ueda) had produced the photographs of the model as per exhs D12A to D12G and DW1 explained the existence of the slopes (see pp 41 to 43 of the notes of evidence recorded by myself). The plaintiff (PW1) in his witness statement in encl 28 at question number 17(a) referred to the scaled down model of the house (ie of the building itself) but the plaintiff (PW1) did not refer to the model of the entire project as shown in exhs D12A to D12F. It would be appropriate to mention that when the plaintiff (PW1) was questioned under cross-examination in regard to the model, he was rather evasive(see p 17 of the notes of evidence recorded before J1). The notes of evidence showed the following exchanges:

Q: When you went to the site office were there any models of the development?

A: Yes, there (was a) large scale model of the entire project as well as the model of individual designs.

Q: Did not the large scale model based on the contour of the land?

A: Yes.

Q: That model showed the slopes?

A: I can't remember.

[39] It was quite obvious that the plaintiff (PW1) knew but he chose to evade the truth of the whole matter. The plaintiff (PW1) obviously chose not to speak the truth even though he saw the models that were on display. In my judgment, the contract between the parties was not voidable because the plaintiff (PW1) had the means of discovering the truth with ordinary diligence and the exception to s 19 of the Contracts Act 1950 does not apply.

[40] In regard to the building plan, I have this to say:

(1) that DW1 (Hiroshi Ueda) in cross-examination had indicated that the building plan would not show the slope and that it only relates to the building proper;

(2) that DW1 (Hiroshi Ueda) was cross-examined to show that the building plan in the Second Schedule to the agreement as reflected at p 37 of encl 26 did not indicate the slope but DW1 (Hiroshi Ueda) denied that the defendant sold a piece of flat land (see p 69 of the notes of evidence recorded by myself); and

(3) the learned counsel for the plaintiff 'put' questions to DW1 (Hiroshi Ueda) as reflected at p 71 of the notes of evidence recorded by myself in regard to the topographical terrain and the misrepresentation but, alas, no evidence had been led by the plaintiff to prove the contents of what was 'put' and the learned counsel for the plaintiff even admitted that by 'putting' questions, she was indeed putting across the plaintiff's case (see p 68 of the notes of evidence recorded by myself) not realising that she did not lead evidence of the plaintiff (PW1) when the latter was in the witness box on what was 'put' to DW1 (Hiroshi Ueda).

(d) The neutral evidence

[41] It would be appropriate for me to set out the neutral evidence not in its order of importance:

(1) DW1 (Hiroshi Ueda) in re-examination made it clear that the building plans do not show the topographical terrain of the land (see pp 76 to 77 of the notes of evidence recorded by myself) and the contour plan is not attached to the sale and purchase agreement (see p 77 of the notes of evidence recorded by myself).

(2) DW1 (Hiroshi Ueda) has denied that the plaintiff had complained to the Ministry in regard to the slope at the rear of the house (see pp 73 to 74 of the notes of evidence recorded by myself).

(3) DW2 (Chin Yu Tow @ Cheng Yu Thou), the architect, in cross-examination has confirmed that the building plan will not show the slope (see pp 90 to 91 of the notes of evidence recorded by myself).

(4) At p 92 of the notes of evidence recorded by myself, DW2 (Chin Yu Tow @ Cheng Yu Thou) was asked the following question:

> Q: You choose to indicate the split level in the building plan at p 233 of L26 and yet you chose not to indicate the steep slope that appeared at the rear of the house. Why is that so?

And he ventured the following answer:

> A: The split here is part and parcel of the design of the house (ie the building). So it is part of the work required for the building. Whereas for the slope (it) does not form part of the work on the building. There is no work to be done on the building.

(5) And again at pp 94 to 95 of the notes of evidence recorded by myself, DW2 (Chin Yu Tow @ Cheng Yu Thou) maintained his position. Under cross-examination, the learned counsel for the plaintiff 'put' the following questions and the answers thereto came naturally (at pp 95 to 96 of the notes of evidence recorded by myself):

> Put: That you had not reflected the actual platform of the land on your building plan at p 233 of L26 thereby misleading the topography of the land.
>
> A: There was no need to because this was a building plan.
>
> Put: The developer sold the house to the plaintiff with a steep slope at the rear of the house and yet you being an architect of the project shows not to indicate those slopes in the building plan.
>
> A: This is (refer to p 233 of L26) a building plan and so it only shows the building.
>
> Put: Your building plan is not an accurate representation of the structure of the land on which the house is to be constructed.
>
> A: This is a building plan and it will therefore show only the type of building that is to be erected.'

[42] But the plaintiff had not called any evidence in order to fortify the contents of what was put under cross-examination. The plaintiff had not called, for instance, any other architects to show that DW2's (Chin Yu Tow @ Cheng Yu Thou's) answers were wrong on what should be incorporated in a building plan. The onus of proof falls on the plaintiff to lead evidence in order to establish the misrepresentation. The plaintiff should have called the maker of the misrepresentation in order to establish it *(Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1). Here, the plaintiff (PW1) did not call DW4 (Siow Fook Lin) as his witness. The plaintiff (PW1) merely asserts a fact without leading evidence. Had the plaintiff (PW1) called DW4 (Siow Fook Lin) he would be faced with the same evidence which DW4 (Siow Fook Lin) gave in court. It goes without saying that I should accept the evidence of DW4 (Siow Fook Lin).

[43] It is not out of place to state that, firstly, the story of the plaintiff in regard to the alleged representation was wholly improbable having regard to the models that he had seen. Secondly, the plaintiff should have visited the site and made his own inquiries. It must be borne in mind that there is no mention in the sale and purchase agreement of the state or condition of the land. Thirdly, in appreciating and being receptive to oral evidence, this court must have regard to the contemporaneous documents when there is a conflict of oral evidence, after all, the weight of documentary evidence outweighs everything else (*Subramanian v Retnam* [1966] 1 MLJ 172; and *Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd* [1983] 2 MLJ 8 (PC). Fourthly, s 92 of the Evidence Act 1950 prohibits the admissibility of oral evidence to vary the sale and purchase agreement which is in statutory form as it is prescribed

by the Housing Developers (Control And Licensing) Regulations 1989. Fifthly, s 92 (a) of the Evidence Act 1950 does not apply to the present case at hand. Even ss 92(b) or 92(c) of the Evidence Act 1950 do not apply to the present case and in, any event, reg 11 of the Housing Developers (Control And Licensing) Regulations 1989 reign supreme. Sixthly, there is a marked absence of any collateral agreement and it has not even been pleaded. Seventhly, it is not pleaded in the amended statement of claim as to the express or implied authority of DW4 (Siow Fook Lin) to bind the defendant. At any rate, as a mere employee DW4 (Siow Fook Lin) is not in a position to bind the defendant (*Chew Hock San & Ors v Connaught Housing Development Sdn Bhd* [1985] 1 MLJ 350 (FC)).

THE THIRD ISSUE

[44] This issue relates to the fencing that surrounds the double storey bungalow house. There is no doubt that the defendant had erected the fence on the land when construction commenced and before execution of the sale and purchase agreement. There was no cross-examination of DW1 (Hiroshi Ueda) or DW2 (Chin Yu Tow @ Cheng Yu Thou) in regard to the date the fence was first put up. Hence their evidence — referring to DW1 and DW2, must be accepted. The reasons for putting up the fence were ventilated and they may be stated in this way:

(1) The fence was put up for safety reasons at the flat edge of the land (see DW1's witness statement at question 62 of encl 28, evidence of DW1 (Hiroshi Ueda) and DW2's (Chin Yu Tow @ Cheng Yu Thou's) evidence at p 99 of the notes of evidence during cross-examination as per my notes of evidence).

(2) DW2 (Chin Yu Tow @ Cheng Yu Thou) was asked in cross-examination as to why the fence was not indicated in the drawing at p 233 of encl 26 and DW2's answer was this: 'the building plan was approved much earlier'.

(3) DW2 (Chin Yu Tow @ Cheng Yu Thou) maintained in the cross-examination that there was no need to submit a building plan with the indication of the fence for safety reasons (see p 100 of the notes of evidence recorded by myself).

[45] Now, in so far as the evidence of both DW1 (Hiroshi Ueda) and DW2 (Chin Yu Tow @ Cheng Yu Thou) were concerned in regard to the 'fencing issue', they remain unchallenged. The plaintiff did not produce any evidence either from the local authority or from other architects as to what should or should not be included in the building plan.

[46] I will now say something about the 'boundary' by referring to the evidence at hand. I will do so now.

(1) Throughout the trial the plaintiff maintained that the fence at the rear of the house was the boundary. He based this on what he claimed was represented to him by DW4 (Siew Fook Lin). The plaintiff could have caused a title survey and led evidence on it but he did not.

(2) In cross-examination (see p 16 of the notes of evidence recorded before J1), the plaintiff was asked: 'If you had a survey would you (not) have known of the outer boundary (of) your bungalow?' His answer was: 'I am not sure'. This was certainly an evasive answer bearing in mind that the answer was obvious. The plaintiff was also asked in regard to the defendant's letter (see p 22 of the notes of evidence recorded before J1). The exchange went like this: 'Did you not verify rear boundary fell on slope?' The plaintiff answered: 'No'. The plaintiff maintained that to him 'the main purpose of the fence was to demarcate the boundary'. The plaintiff was not objective at all.

(3) It is the plaintiff's case that the fence was at the rear boundary of the land (see questions 18 to 19 of the witness statement in encl 28 and p 22 of the notes of evidence recorded before J1). The plaintiff did not measure the land. The plaintiff merely assumed that the fence at the rear demarcated the boundary. The plaintiff's assertions were mere surmises. It was not based on the facts because:

(i) he had not carried out a survey;

(ii) the defendant had explained that the fence was put up at the end of the flat part of the land on the rear; and

(iii) that DW3 (Liew Nam Siong) who did the survey said that the fence was within the boundary of the land — the evidence of DW3 (Liew Nam Siong) carried a lot of weight because he did the title survey.

[47] The defendant maintained that the fence was not indicative of the boundary of the land (see the witness statement at question number 73 of DW1 (Hiroshi Ueda)). At p 64 of the notes of evidence recorded by myself there was evidence to show that the qualified title was available at the time of the purchase of the property and it showed the boundary. The defendant had also maintained this stand throughout and even at the Ministry of Housing. In cross-examination, DW1 (Hiroshi Ueda) said that the Ministry had said that the 'land size' was a non-issue (p 73 of the notes of evidence recorded by myself). Sadly, there was no contrary evidence. The minutes of the Ministry without the unauthorised amendments by the plaintiff (PW1) (see p 218 under 2.2.1 of encl 26 and D13B) would bear this out. The plaintiff's request was recorded by the Ministry in this way (see p 219 at para 3.1 of encl 26):

Hanya yang dikehendaki pihak pemaju merobohkan pagar yang dibina dan memberikan tanah semula menurut yang telah ditetapkan.

[48] And that was the position as shown in the title and that was what was already provided. Unfortunately, the defendant's offer to demolish the fence was refused.

[49] DW1 (Hiroshi Ueda) and DW2 (Chin Yu Tow @ Cheng Yu Thou) were cross-examined. When DW1 was being cross-examined, it was suggested that the slope at the rear of the house was part of the land sold to the plaintiff (see p 68 of the notes of evidence recorded by myself). DW1 was also asked, 'would you agree with me as stated at paragraph 2 of your letter — see p 167 of L 26, that some parts of your boundary line fall into the slope?' and DW1 answered, 'Yes' (see p 72 of the notes of evidence recorded by myself). Similar question was also put to DW2 (Chin Yu Tow @ Cheng Yu Thou) at p 99 of the notes of evidence recorded by myself and it was worded like this:

> Q: Would you agree that the fence at the rear of the house is not indicative of the boundary line — in regard to the house purchased by the plaintiff?
>
> A: Yes, it is not indicative of the rear boundary.

[50] I must, at once, say that these questions are leading questions suggesting the case for the plaintiff. So the plaintiff must be bound by the answers thereto. The answers showed that the fence did not and cannot demarcate the boundary.

[51] There was also the evidence of DW3 (Liew Nam Siong). He was the field assistant and his evidence was very clear indeed. He laid out the boundary pegs (see questions 19 to 20 of encl 82). He stated that the rear boundary fell onto a slope (see question 24 of encl 82) and that the fence was located within the boundary (questions 29 to 30 of encl 82). According to him the fence did not demarcate the boundary of the lot (question 31 to encl 82). Under cross-examination, DW3 (Liew Nam Siong) maintained that the 'boundary line for the unit purchased by the plaintiff … (fell) on the point at the slope' (see p 108 of the notes of evidence recorded by myself). DW3 (Liew Nam Siong) became aware of the fence when he did the re-survey in 1999 (see p 109 of the notes of evidence recorded by myself). Thus, it was no longer open to the plaintiff to say that there was a shortfall or that the land sold was a flat land.

[52] I will now say something about the all round fencing. When the architect by the name of Chin Yu Tow @ Cheng Yu Thou (DW2) gave evidence he was questioned by way of cross-examination (see p 97 of the notes of evidence recorded by myself):

> Q: Why did you choose to provide chain link fencing all around for type B unit and not for type B2 that was purchased by the plaintiff?

A: The chain link fencing was provided for only one unit of type B4 because the developer requested it as they wanted to retain this unit.

[53] Again at pp 98 to 99 of the notes of evidence recorded by myself, DW2 (Chin Yu Tow @ Cheng Yu Thou) was being cross-examined in this way:

Q: At p 241 of L26 it is indicative that high chain link fencing all around is to be provided and how would one interpret your drawing?

A: The developer specifically instructed that they would want one unit to be provided with this chain link fencing.

[54] DW2 (Chin Yu Tow @ Cheng Yu Thou) further explained that the plan for type B4 was a standard plan. But if one looks at p 42 of encl 26, the item reads as follows:

Fencing

5'-0' High brick fencing with metal grilles and letter box in front …

[55] And it is rather obvious that fencing is only provided in the front.

[56] Now, type B4 unit was not the type of unit that was sold to the plaintiff. It was irrelevant on the part of the plaintiff to refer to type B4 which was sold to Chong Sea Chuen (see p 61 of the notes of evidence recorded by myself). The plaintiff bought type B2 unit. At any rate, it was part and parcel of my judgment that the building plan did not create the contract of sale. The sale and purchase agreement and the specifications set out thereunder would bind the parties. The issue as regards the fencing has been laid to rest by p 42 of encl 26 as reproduced earlier.

[57] It would now be appropriate to harp on the issue of trespass. It was the plaintiff's case that the erection of the fence at the rear of the property that was purchased by the plaintiff constituted the alleged trespass as set out in the amended statement of claim.

[58] The plea of trespass must be examined with care. Unless the plaintiff is the owner of or entitled to possession of the land there can be no trespass (see Bullen & Leake & Jacob's *Precedents of Pleadings* (13th Ed at pp 923 to 925). The erection of the fence was said to constitute trespass because it was erected within the land and not on the slope. At the time when the fence was erected the land did not belong to the plaintiff but to the defendant. In my judgment, there was no basis whatsoever for the plea of trespass. The unchallenged and undisputed evidence would be this. That the fence was erected by the defendant's contractor when:

(1) the defendant was still the registered owner of the land;

(2) and the plaintiff (PW1) even admitted that the fence was put up before the sale to the plaintiff (see p 19 of the notes of evidence recorded before J1 and question 64 of encl 28);

(3) DW1 (Hiroshi Ueda) also maintained that position too as reflected at p 59 of the notes of evidence recorded by myself;

(4) DW2 (Chin Yu Tow @ Cheng Yu Thou) stated that he instructed the contractor to put up the fence before or during construction (see the witness statement at encl 81 of question 23 and the notes of evidence recorded by myself at p 99); and

(5) possession was handed over in April/May 1995 as reflected at question 141 of encl 28.

[59] Even the learned counsel for the plaintiff put leading questions as to the reasons for the erection of the fence (see p 99 of the notes of evidence recorded by myself):

Q: Would you also agree with me that the fence erected at the rear of the house purchased by the plaintiff was for safety reasons?

A: Yes.

Q: Did you instruct the contractor in charge to erect a fence there for safety reasons — at the rear of the house?

A: Yes, My Lord.

[60] These questions and the answers thereto must be accepted by the plaintiff as the plaintiff's case and that the plaintiff was merely seeking a confirmation and not challenging the witness.

[61] The plaintiff advanced a further question to DW2 (Chin Yu Tow @ Cheng Yu Thou) as seen at p 100 of the notes of evidence recorded by myself:

Q: Since the erection of the fence was not indicated in your building plan at p 233 of L26 why was it not removed upon the completion of the construction of the bungalow?

A: Firstly, it was built for safety reasons. So it would also serve as a safety for the buyer or the buyer's children. That was why it was left there.

[62] Indeed putting up the fence was a wise move on the part of the defendant. It was quite commendable. It was entirely up to the plaintiff to remove the fence if he did not want it. Even the defendant had offered to demolish the fence at its own costs but the plaintiff refused to accept the kind offer (see p 73 of the notes of evidence recorded by myself, see questions 138, 139 and 140 of encl 28, and see question 158 at p 15 of encl 32). Since the land had been transferred to the plaintiff, the defendant was unable to enter the land and demolish the fence at will. In my judgment, there was no basis for the claim in trespass.

[63] It must be borne in mind that there was no plea in the amended statement of claim that the defendant prevented the plaintiff from doing the works on the slope. Despite such an impediment, there was some suggestion in the plaintiff's evidence to this effect (see p 22 of the notes of evidence recorded before J1):

Yes, one letter says this but another say I cannot remove.

[64] The defendant had at p 196 of encl 194 warned the plaintiff that the defendant will hold the plaintiff 'liable for all reinstatement and failure of slope on the drainage reserve if any work is done without permission.' This was a perfectly sound warning for the protection of the drainage reserve and that permission have to be sought from the authorities. Be that as it may, the principle of caveat emptor should be addressed here. 'Let the buyer beware' is a prudent rule in the context of any sale and purchase agreement. It is not the plaintiff's pleaded case that the defendant was under some duty contractual or otherwise to describe the quality or state of the land. The plaintiff's pleaded case, all along, is founded on misrepresentation and a breach of the term of the contract. But a perusal of the contract would show that there is clearly no term in the contract describing the entire area of the land as a 'flat' land. The plaintiff should be put on the alert as the models were made available by the defendant and those models showed the overall representation of the entire development. Even DW1 (Hiroshi Ueda) had given clear instructions that the buyers should visit the site for themselves (see pp 47 and 79 of the notes of evidence recorded by myself; see also questions 31 to 32 of encl 28). In my judgment, the plaintiff as the buyer must take care and must not rely on the 'skill or judgment' of the defendant as the seller. The plaintiff as the buyer — here as the purchaser of the double storey bungalow house, he must not take a chance. He should have visited the site himself and if he did he would have seen the slope.

[65] The plaintiff's submissions were simply like this. That the plaintiff had signed the sale and purchase agreement and the plaintiff expected and was supposed to get 10,450 square feet of land area with a double storey bungalow house built on it. And that since the plaintiff eventually obtained 696 square feet of sloped land out of the total area of the land, the plaintiff did not get what he had bargained for. According to the plaintiff, the 696 square feet of land is a slope land that ends into a drain reserve which is of no use to the plaintiff unless some remedial work is done on the slope. The learned counsel for the plaintiff submitted that the plaintiff was shocked and could not believe that the slope existed at the rear of the double storey bungalow house. According to the plaintiff he would not have purchased the said house had he known that there was a slope at the rear. But with respect, there was no such evidence in the notes of evidence. It was not put to DW4 (Siow Fook Lin) at all. The issue of the slope did not arise in the first letter to the defendant developer. It only arose when DW1 (Hiroshi Ueda) explained that the boundary fell on the slope. It must not be forgotten that the defendant was under no obligation to remedy the slope. The defendant offered to refund the entire purchase price and take the property back in order to settle the plaintiff's complaint but the plaintiff did not agree.

[66] The starked facts stand out like a pikestaff against the plaintiff. The evidence against the plaintiff was overwhelming. In my judgment, it was the

plaintiff's witnesses and not the defendant's witnesses who were evasive and gave evidence in a wayward manner. There was also evidence of an attempt to extort RM20,000 from the new buyer on the false basis that the defendant would build a fence.

[67] Be that as it may, the plaintiff's submission has not dealt with the several legal and factual issues raised by the defendant as alluded to in the early part of this judgment. It seems to me that the plaintiff's submissions completely ignored the legal effect of the documents in Part 'A' of the bundle of documents in that the contents of those documents were agreed by the parties and admitted as true. It would be appropriate to say that the plaintiff's submission mischaracterises and misdiagnoses the problem and the prescription in the present case.

THE FOURTH ISSUE

[68] According to O 18 r 15(1) of the Rules of the High Court 1980 ('RHC') the statement of claim must specifically set out the relief or remedy claimed. Now, the amended statement of claim in encl 84 sought for the following prayers:

(1) specific performance of backfilling and levelling of the land on the slope so that it would be on the same level as the existing flat land;

(2) demolition of the existing concrete wall and steel fence separating the said flat land from the sloping land;

(3) erection of a new fence on the new border according to the agreed original plan;

(4) in the alternative, all the expenses incurred in carrying out prayers (1), (2) and (3) above;

(5) special and general damages for trespass; and

(6) damages.

[69] I will now consider the plaintiff's entitlement to each of the relief.

SPECIFIC PERFORMANCE

[70] Specific performance can only be sought if there exists a valid contract. The plaintiff had maintained that there was a misrepresentation. But the defendant says that based on the pleadings, the misrepresentation was an innocent misrepresentation. An innocent misrepresentation, if established only entitles the plaintiff to rescind the contract and seek restitution — a refund of the purchase price which he had paid. The plaintiff was not entitled to damages (*Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd*; and *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim*). Factually speaking, here, there was no rescission at all. Instead there was a total affirmation. The land and the

double storey bungalow house had been transferred to the plaintiff. In his amended statement of claim, the plaintiff sought for specific performance in order to fill the land at the back portion and to erect a fence, etc. But, unfortunately, there is no term in the sale and purchase agreement for this to be done. And the court too would not decree specific performance of such a building contract. Moreover, the plaintiff has not led evidence on this point. Even though the plaintiff has led evidence on the costs of such exercises yet there were no approved plans and engineering drawings tendered by the plaintiff.

[71] The law is clear. That an order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. However, there are restrictions on the availability of the equitable remedy of specific performance and it is entirely at the court's discretion.

DEMOLITION

[72] The plaintiff sought for an order for demolition of the fence at the rear. On the evidence the defendant had offered to demolish the said fence but the plaintiff had refused.

ERECTION OF A NEW FENCE

[73] There is no provision in the sale and purchase agreement for the erection of a fence at the rear of the double storey bungalow house. So how could the plaintiff seek what is not in the contract? At prayer (3), the plaintiff seeks for the fence to be erected 'according to the agreed original plan'. But where is this plan? Moreover, the approved plan and specifications for bungalow type B2, the type that was purchased by the plaintiff, provided for no fencing at the rear.

MONETARY CLAIM

[74] Has the plaintiff incurred any expenses in carrying out the following works:

(1) 'back filling and levelling the land on the slope so that it is on the same level as the existing said flat land';

(2) 'demolition of the existing concrete wall and steel fence separating the said flat land from the sloping land'; and

(3) 'erection of a new fence on the new border according to the agreed original plan?

[75] The answer would be in the negative. The fact of the matter was this. That the plaintiff had not carried out any works and he produced no evidence of the expenses incurred by him. Under cross-examination, the plaintiff (PW1) said (see pp 23 to 24 of the notes of evidence recorded by myself):

Q: You agree that you have not erected any fence at the back of the house?

A: That I would agree.

Q: You agree that you did not incur any expenses in not erecting any fence?

A: Yes, I did not erect any fence.

Q: Did you incur any expense in filling up the land at the back of your house?

A: No, I did not build the fence yet.

Q: You agree that there is no provision or term in D6 for you to fill up the land and put up the fence?

A: Yes, that is not part of the agreement.

Q: Is it RM54,000 your alternative claim in your statement of claim?

A: The statement of claim for the alternative is for the claim of all expenses incurred or to be incurred to make the land flat as originally planned.

Q: Until you sold to Niaga Tech have you incurred any such expenses?

A: I have not built the wall and so I have not incurred expenses.

[76] The plaintiff had re-sold the double storey bungalow house to Niaga Tech Communications. The sale and purchase agreement between the plaintiff and Niaga Tech Communications described the land to be 10,450 square feet (see exh 'D6' and p 9 of the notes of evidence recorded by myself). The RPGT form in exh 'D7' also described the land as 10,450 square feet and it contained a declaration of trust (see p 11 of the notes of evidence recorded by myself). By this re-sale, the plaintiff had ceased to be the owner of the subject property.

[77] Certain observations must be made in regard to the sale and purchase agreement between the plaintiff and Niaga Tech Communications as reflected in exh 'D6'. They may be stated as follows:

(1) clause 8A(1) of 'D6' makes reference to the present suit and the plaintiff (PW1) stated at p 9 of the notes of evidence recorded by myself that he did not give a copy of the statement of claim to the buyer's solicitors (see also cl 8 (a)(iv) of 'D6');

(2) clause 8A(ii) of 'D6' states that the purchaser undertakes not to remove or tamper with the fence, etc, for a period of one year with the proviso 'that all costs of construction of the above incurred shall be borne by the purchaser solely';

(3) what it amounts to is this: that the plaintiff would not incur any loss or expense on account of the removal of the existing fence or the erection of a new one;

(4) clause 8A(v) of 'D6' states that the purchaser will not make any claim for any difference of the area which is less than what is set out in the title;

(5) clause 8A(iii) of 'D6' stipulates that the plaintiff (or the vendor) will retain the benefit of any money judgment he recovers in this suit; and

(6) that despite the clear words of cl 8A(ii) of 'D6' the plaintiff in cross-examination at p 20 of the notes of evidence recorded by myself maintained that he did not intend the said clause to mean what it says.

[78] Interestingly there was a letter dated 21 May 2001 marked as exh 'D9' emanating from the plaintiff's solicitors. By that letter the plaintiff had requested Niaga Tech Communications to accept the offer of the construction of the retaining wall by the defendant at the price of RM20,000 and sought the agreement of Niaga Tech Communications. Although the plaintiff objected to the admissibility of this letter — referring to exh 'D9' (see p 11 of the notes of evidence recorded by myself) yet the court allowed the cross-examination of this letter which was then marked accordingly (see p 20 of the notes of evidence recorded by myself). By this letter (exh 'D9'), the plaintiff was conveying an offer by the defendant to put up a wall at RM20,000. When cross-examined, the plaintiff said:

> My interpretation is that my solicitor is enquiring of the buyer whether they will be interested in the construction of the wall which is being offered to the buyer.

[79] Very conveniently, the plaintiff avoided the falsity of the alleged offer by the defendant. There was no such offer by the defendant at all. The evidence showed the following question and answer:

Q: Do you have any evidence of the price quoted by the developer to build the retaining wall?

A: No, my Lord.

[80] The plaintiff claimed that he was unaware of the reply to the letter in exh 'D9'. But when the reply was shown and produced and marked as exh 'D10', the plaintiff relented and admitted it to be so. Throughout, the plaintiff was very evasive in suggesting that the offer came from the defendant which offer, at any rate, did not materialise at all (see p 25 of the notes of evidence recorded by myself). It is ideal to state that the sum of RM20,000 to be paid by Niaga Tech Communications was to go to the plaintiff personally (see p 26 of the notes of evidence recorded by myself). Subsequently, the plaintiff changed his version in regard to the source of the offer of RM20,000 (see p 28 of the notes of evidence recorded by myself). The notes of evidence showed this exchange:

Q: The developer's price was RM20,000 for the fence?

A: No, it does not say that.

Q: In 'D9' you are suggesting that the developer's price was RM20,000?

A: No, it was my offer to the purchaser.

[81] But the plaintiff did not explain as to why he made the offer to Niaga Tech Communications to put up a fence at the cost of RM20,000 when the present suit was still pending. The truth of the matter was this. That the new buyer — referring to Niaga Tech Communications, had put up its own wall and fence (see the examination-in-chief of DW2 (Chin Yu Tow @ Cheng Yu Thou) at pp 87 to 88 of the notes of evidence recorded by myself and exhs 'D14A to D14E'). And surprisingly DW2 (Chin Yu Tow @ Cheng Yu Thou) was not cross-examined on this point.

[82] Be that as it may, the plaintiff attempted to lead evidence in regard to the loss of value. This attempt was disallowed by the court (see p 23 to p 35 of the notes of evidence recorded by myself). At any rate, the amended statement of claim did not contain the averment in regard to the loss of value. It was not even pleaded and it was not part and parcel of the prayers in the amended statement of claim. It must be emphasised that loss of value constitutes special damages and, unfortunately, there was no valuation evidence on the point. DW1 (Hiroshi Ueda) was not even cross-examined on it. The law is clear. That one must plead and particularise the claim for special damages. Diplock LJ in *Ilkiw v Samuels & Ors* [1963] 1 WLR 991 aptly said at p 1006 of the report:

> Special damage, in the sense of a monetary loss which the plaintiff has sustained up to the date of trial, must be pleaded and particularised.

[83] Further down the same p of the same judgment, Diplock LJ had this to say:

> In my view, it is plain law — so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years — that you can recover in an action only special damage which has been pleaded, and, of course, proved.

[84] Devlin J in *Hayward & Anor v Pullinger & Partners Ltd* [1950] 1 All ER 581 also remarked that special damage has to be pleaded.

[85] And one cannot simply write down the particulars and throw it to the court without adducing evidence to prove it (*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, at p 784 to 785).

[86] In regard to the issue of damages for trespass, I have this to say. I have held earlier that there was no trespass and, consequently, there can be no damages for it. In any event, there are no particulars itemised by the plaintiff of the damages for trespass and the plaintiff had failed to lead any evidence on it.

[87] Since the double storey bungalow house had been re-sold to Niaga Tech Communications, the plaintiff's claim had become academic. The reliefs sought by the plaintiff to remove the fence, and to erect a new fence would not be carried out at all. It was on this basis that the plaintiff was recalled for cross-examination. There was vigorous opposition to the cross-examination

and the non-disclosure of the re-sale (see pp 12 to 21 of the notes of evidence recorded by myself). It is a correct statement of the law to say and I so say that where the subject matter has ceased to exist by virtue of the re-sale, the reliefs sought are unavailable and the plaintiff's claim must fail. The court would certainly not engage in matters that have become academic. In the words of Lord Bridge of Harwich in *Ainsbury v Millington* [1987] 1 All ER 929 (HL) at pp 930 to 931:

> It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

THE LEGAL SEMANTICS

[88] The plaintiff conceded that there was no express term in the sale and purchase agreement that the land will be flat. This meant that the averment at para 4 of the amended statement of claim which reads:

> It was a term of the said sale and purchase agreement that the purchased property measured 110 feet x 95 feet with an area of 10,450 square feet.

must be construed to be wrong. There can be no breach of a term that was not incorporated in the sale and purchase agreement. But the plaintiff was adamant and contended that he could rely on an implied term. In response, I have this to say. That the implied term must be pleaded and the particulars set out therein. If the implied term was not pleaded the plaintiff cannot rely on it. According to the plaintiff he was entitled under the sale and purchase agreement to obtain 10,450 square feet of land suitable not only for the bungalow to be built but also for him to do landscaping and other things necessary to enable him and his family members to enjoy and use the land to the optimum. The plaintiff expected the whole area to be flat and the defendant was expected to give him a flat land. This was the implied term that the plaintiff would want this court to imply. With respect, I cannot accede to such an agreement. Onpleadings, generally, a string of authorities can readily be cited. For starters, I shall refer to the case of *Appuhamy v Dato' Ajit Singh* [1970] 1 MLJ 194 where Ong CJ aptly said at pp 195 to 196 of the report:

> Since the employment so continued until February1966, was it on the implied term that no salary was payable during incapacity? On this ground only could the respondent have denied liability. This, however, was not his defence; what he specifically pleaded was that the implied term postulated physical capacity in the appellant to perform his duties and the latter's incapacity by illness entitled the respondent to, and he did, terminate the contract of service with effect from 1 July 1965. If the respondent relied on an implied term of a different character, it should have been pleaded and an amendment made when the necessity for so doing became apparent. This, however, was not done and I do not think it permissible for the respondent now to rely on a defence which was never raised. Cases must be decided on issues on the record: if it is desired to raise other issues they must be placed on

A the record by amendment: see *Blay v Pollard* [1930] 1 KB 628 per Scrutton LJ and *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 per Lord Radcliffe.

[89] Now, although *Appuhamy*'s case involved a defence, the observations of Ong CJ must equally apply to a claim. There, the respondent had pleaded one implied term but sought to raise a different implied term and the court B disallowed it. Here before me, there was a total absence of any implied term in the amended statement of claim. The next case to refer to would be the case of *Upton v Chipman* (1892) 13 Australian Law Times 312 and there the headnote states as follows:

C Where a party intends to rely on previous dealings between the parties to add an implied term to a written contract he must set it out in his pleadings.

[90] Next, it would be the case of *Burton v Karbowsky* (1914) SR 14 NSW 373 where Ferguson J upheld the demurrer (striking out under the old rules of pleading) for failure to plead. At p 380 of the report, Ferguson J remarked:

D The plaintiff, in suing upon an implied promise arising under this agreement, had two courses open to him. He might have alleged in terms the promise which he claimed as being implied: as for example that the defendant for the considerations stated had promised to supervise the construction of the machine, or that he had promised to do all things necessary on his part to enable the plaintiff to construct the machine. On the trial he would have given in evidence the written agreement E and the surrounding circumstances, and it would then have been for the judge to interpret the document in the light of the finding of the jury on the facts. As the plaintiff did not adopt this course, but set out verbatim an agreement depending for its interpretation upon surrounding circumstances, it lay upon him to allege those circumstances with certainty, in such a way that the interpretation he contends for must follow as a matter of necessary implication. I do not think these indispensable F allegations are to be found in the declaration: and in my opinion, therefore, the demurrer must be upheld.

[91] It is clear that implied terms are not to be had for the asking. The English Court of Appeal had recently revisited the principles governing implied terms in the case of *R Griggs Group Ltd & Ors v Ross Evans & Ors* [2005] EWCA Civ 11 G — this case was decided on 25 January 2005 with a coram of Lord Justice Chadwick, Lord Justice Jacob and Mr Justice Lloyd. Writing for the English Court of Appeal, Lord Justice Jacob adopted Lightman J's summary of the case of *Robin Ray v Classic FM* (1998) FSR 622 at para 13 (4) and it must be referred to. It was indeed instructive:

H (4) the law governing the implication of terms in a contract has been firmly established (if not earlier) by the decision of the House of Lords in *Liverpool City Council v Irwin* [1977] AC 239 ('Liverpool'). In the words of Lord Bingham MR in *Philips Electronique v BSB* [1995] EMLR 472 ('Philips') at 481, the essence of much learning on implied terms is distilled in the speech of Lord Simon of Glaisdale on I behalf of the majority of the *Judicial Committee of the Privy Council in BP Refinery (Westernport) Pty Ltd v The President, Councillors and Ratepayers of the Shire of Hastings* (1978) 52 ALJR 20 at 26:

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

Lord Bingham added an explanation and warning:

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.
>
> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.

[92] All these principles of law must be vigorously applied here. What it amounted to would be this. That the implied term contended by the plaintiff should not be implied because:

(1) it is not reasonable or equitable;

(2) it is not necessary to give business efficacy to the contract because the sale and purchase agreement is effective without it;

(3) it is not so obvious that it would attract the reply of 'it goes without saying';

(4) it is not capable of clear expression; and

(5) it is contradictory to the express terms of the sale and purchase agreement.

CONCLUSION

[93] For the reasons as adumbrated above, I dismissed the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

Reported by Peter Ling